Supreme Court, U.S.
FILED
JAN 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1148

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

JOHNNY S. SHORT,
Cross-Petitioner,

v.

KIAMICHI AREA VOCATIONAL-TECHNICAL
SCHOOL DISTRICT NO. 7,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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QUESTION PRESENTED

Under the Supremacy Clauce of Article VI of the United States Constitution, does this Court's March 19, 1985 decision in *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532 (1985), that a public school employee with a property interest in continued employment be afforded a pretermination hearing, apply to Cross-Respondent School District's April 2, 1985 decision to terminate Cross-Petitioner's employment, notwithstanding the fact that "the school board may not have known" about *Loudermill* when it took the action in question?

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Art. VI 2

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Cross-Petitioner, Johnny S. Short, respectfully prays that if this Court grants the December 12, 1988 Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma filed by the Kiamichi Area Vocational-Technical School District No. 7 ("School District Petition") to review a portion of the opinion of the Oklahoma Supreme Court in this case,[1] it also grant this Cross-Petition to review the portion of the opinion in which the Oklahoma Supreme Court declined to apply this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), on the ground that the School District "may not have known [of the holding in *Loudermill*] that a pretermination hearing was required to comport with procedural due process," *Short v. Kiamichi Area Vocational-Technical School District No.*

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[1] *Kiamichi Area Vocational-Technical School District No. 7 v. Johnny S. Short*, No. 88-974 (filed December 12, 1988).

7, 761 P.2d 472, 478 (1988), App. A, 12a.[2] when, some two weeks after issuance of the decision in *Loudermill*, it terminated Cross-Petitioner's employment.

OPINIONS BELOW

The opinions of the courts below are set forth in the Appendices to the School District Petition.

JURISDICTION

The Supreme Court of Oklahoma entered judgment on July 19, 1988, and on September 13, 1988, denied petitions for rehearing filed by both parties. The School District Petition was timely filed with this Court. Counsel for Cross-Petitioner received the School District Petition on December 12, 1988, and is filing this Cross-Petition for Writ of Certiorari within the time permitted by Supreme Court Rules 19.5 and 20. This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

Article VI of the United States Constitution provides, in pertinent part, as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

STATEMENT OF THE CASE

On March 19, 1985, this Court issued its decision in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, holding that, under the due process clause

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[2] References herein to "App. A" are to Appendix A of the School District Petition.

of the 14th Amendment, a public school employee with a property interest in continued employment must be afforded a pretermination hearing. Some two weeks later, on April 2, 1985, the Kiamichi Area Vocational-Technical School District No. 7 ("School District") notified Cross-Petitioner, Johnny S. Short, a tenured teacher, that he was being nonrenewed. The School District did not provide Short with any opportunity to be heard prior to making its nonrenewal decision, and Short instituted proceedings in the Oklahoma state court, contending, *inter alia*, that he had been denied procedural due process. The Oklahoma Supreme Court agreed, holding that the procedure followed with regard to Short's termination "falls short of the *Loudermill* standard." 761 P.2d at 477; App. A at 8a.

Turning to remedy, the Oklahoma Supreme Court observed that "[i]t remains for us to determine whether a *Loudermill* hearing should be afforded full retroactive effect, purely prospective effect, or retroactively limited to this case." *Id.* at 478; App. A at 12a. After citing this Court's decisions in *Linkletter v. Walker*, 381 U.S. 618, 628-29 (1965) and *Great Northern Railroad Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-65 (1932), for the proposition that "state courts are free to determine, as a matter of policy, the effective date of new rulings, *id.*, and making reference to the factors set forth by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for determining whether judicial decisions should be given retroactive effect, the Oklahoma Supreme Court stated:

> At the time Short's contract was nonrenewed, *Loudermill* had been promulgated for only two weeks. Therefore, the school board may not have known that a pretermination hearing was required to comport with procedural due process. . . . . *Id.* at 478; App. A at 12a.

Accordingly, despite its finding that Short had not received the pretermination hearing to which he was en-

titled under *Loudermill*, the Oklahoma Supreme Court denied him any relief. The court concluded that its "pronouncement [regarding the due process requirements of *Loudermill* would] be given purely prospective effect," and would apply only to "termination or nonrenewal cases involving tenured teachers occurring after the mandate herein is issued." *Id.* at 479; App. A at 13a.[3]

REASONS FOR GRANTING THE CROSS-PETITION

I. The Oklahoma Supreme Court's Refusal to Apply a Decision of this Court to an Action Taken By the School District After the Issuance of the Decision on the ground that the School District may not have known about the Decision violates the Supremacy Clause.

Because the Oklahoma Supreme Court talked in terms of the "retroactive effect" of *Loudermill*, it is important at the outset to make clear what is and is not at issue here. This case does *not* involve the retroactive application of a decision of this Court, and, accordingly, the Oklahoma Supreme Court's reliance on *Linkletter v. Walker*, *Great Northern Ry. v. Sunburst Oil & Refining Co.*, and *Chevron Oil Co. v. Huson* is misplaced. These cases all involved the effect of a decision of this Court on cases that were pending at the time of, or had gone to final judgment prior to, its issuance. The common thread in the above cases, and indeed in all of this Court's other cases involving the nonretroactive applica-

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[3] The underlying federal question raised in this case—*i.e.*, whether Short is entitled under *Loudermill* to a pretermination hearing—was raised in the appeal of his termination that Short filed in the District Court in and for Choctaw County, Oklahoma. The specific federal question raised in this Cross-Petition—*i.e.*, whether the Oklahoma Supreme Court erred in refusing to apply this Court's March 19, 1985 decision in *Loudermill* to the April 2, 1985 decision to terminate Short's employment—initially surfaced in the opinion of the Oklahoma Supreme Court and was raised by Short in the Petition for Rehearing that he filed with that court.

tion of judicial decisions, is that the challenged action occurred *before* the issuance of the decision that established the new principle of law. In observing that "a decision of this Court could produce substantial inequitable results if applied retroactively," *Chevron Oil Co. v. Huson*, 404 U.S. at 107, this Court has emphasized that the challenged action occurred before the decision in question, and noted that "[t]he most . . . [a party] could do was rely on the law as it then was." *Id.*

The situation in the instant case is totally different, and does not in any sense present the type of reliance found in cases involving the nonretroactive application of a judicial decision. The decision in *Loudermill* was issued on March 19, 1985, and the School District did not make its decision to terminate Short's employment until April 2, 1985, some two weeks later. Thus, when the School District took the action in question, *Loudermill* represented "the law as it then was." *Chevron, supra.* Accordingly, the issue here is *not* the retroactive application of *Loudermill*, but whether, under the Supremacy Clause of Article VI of the Constitution, this Court's holding in that case must be obeyed. It scarcely warrants extended discussion to demonstrate that the answer is yes. As this Court observed in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958):

> Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60, that 'It is emphatically the province and duty of the judicial department to say what the law is.' This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.

See also, e.g., Henry v. City of Little Rock, 376 U.S. 776, 777, n* (1964) ("[A] rule based upon the Constitution of the United States . . ., under the Supremacy Clause, is binding upon the state courts as well as upon federal courts."); *Sims v. State of Georgia*, 385 U.S. 538, 544 (1967).

The interpretation of the due process clause of the Fourteenth Amendment enunciated by this Court in *Loudermill* became the Supreme Law of the Land on March 19, 1985, and under the Supremacy Clause of Article VI of the Constitution it was from that point on binding on the School District. We find nothing in any decision of this Court, or in any theory of constitutional jurisprudence, to suggest that there is some "grace period" before the Supremacy Clause takes hold because "the school board may not have known" of a constitutional rule that previously was announced by this Court.

The Oklahoma Supreme Court's unjustified refusal to apply the Supreme Law of the Land as declared by this Court in *Loudermill* warrants the granting of this Cross-Petition.

II. If this Court Grants the School District Petition, But Does Not Grant this Cross-Petition, the Respondent to the School District Petition would Have No Practical Interest in the Case.

As noted, the Oklahoma Supreme Court held that the procedure followed by the School District in terminating Short's employment "falls short of the *Loudermill* standard", 761 P.2d at 477; App. A at 8a. But, because it gave this holding "purely prospective effect," *id.* at 479, App. A at 13a, the court awarded no relief to Short. Although, for the reasons set forth in this Cross-Petition, the latter aspect of the Oklahoma Supreme Court's decision is patently incorrect, Short did not wish to continue this litigation and, accordingly, did not file a petition for a writ of certiorari in the first instance. This remains Short's preferred position, and

he, therefore, urges this Court to deny the School District Petition,[4] which would in turn preclude the granting of this Cross-Petition, *see* Supreme Court Rule 20.5, thereby bringing this litigation to a close.

If this Court were to grant the School District Petition, but to deny this Cross-Petition, the situation would be anomalous indeed. Although Short believes that the position taken by the Oklahoma Supreme Court with regard to the due process requirements of *Loudermill* is correct, he would have no practical interest in defending that position before this Court, inasmuch as an affirmance would still leave him without any relief. If this Court grants the School District Petition, Short can obtain relief in this case *only* if this Court (1) sustains the position taken by the Oklahoma Supreme Court with regard to *Loudermill*, (2) grants this Cross-Petition, and (3) reverses the position taken by the Oklahoma Supreme Court with regard to the application of *Loudermill* to the termination of Short's employment. The denial of this Cross-Petition, therefore, would mean that Short, who is the only respondent to the School District Petition, would have no practical interest in the question presented by that Petition. A situation in which only one party has an interest in a case before this Court is plainly to be avoided, and, if the School District Petition is granted, this can be done only by also granting this Cross-Petition.

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[4] The grounds for denying the School District Petition will be set forth in the Brief in Opposition to that Petition which Short will file with this Court.

CONCLUSION

For the foregoing reasons, if this Court grants the School District Petition, it also should grant this Cross-Petition for a Writ of Certiorari.

Respectfully submitted,

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January 11, 1989